the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment. As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred* v. *Delagoa Bay and East Africa Railway*(4) there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National Provincial Bank* v. *Harle*(6)) that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute: it purported to pass the entire interest of the assignor in the debt to the mortgageee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment."

Accordingly, the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a subdivided building, strata title, in respect of which is yet to be issued, this court has jurisdiction under section 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property consequential thereto.

If, contrary to my primary opinion, the security herein is not a security relating to a chose in action but a security relating to land, then I would hold that this court has jurisdiction under Order 31 rule 1(1) of the Rules of High Court 1980 (adapted from Order 51 of the English Rules of the Supreme Court 1965) to make an order for sale of the property: see *Oldham* v. *Stringer*.(7)

The plaintiff is, therefore, entitled to all the reliefs prayed for in the originating summons and I make the orders prayed for accordingly.

Order accordingly.

Solicitors: *Cheong Wai Meng & Van Buerle; Jayaraman Ong & Co.*

HASHIM BIN PAWANCHEE & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Dzaiddin J.) November 27 & December 1, 1987]

[Penang – Criminal Appeal No. 51-42-87]

Criminal Procedure – Sentence – Whether sentence was manifestly excessive and unreasonable – Whether factors in favour of accused considered – Whether sentences should run concurrently or consecutively – Discretion of magistrate – Criminal Procedure Code (F.M.S. Cap. 6), s. 171(A)(i).

The two appellants in this case were charged and convicted for six offences under the Penal Code. The six offences were under section 471 and section 403 of the Penal Code. Both appellants pleaded guilty.

Before sentence was passed, the respondent tendered about 112 outstanding offences amounting to a total of 56 charges under section 171(A)(i) of the Criminal Procedure Code. After considering the mitigating factors, both appellants were sentenced to 14 months' imprisonment for each of the six charges and the sentences were to run consecutively. Both appellants appealed against their sentences.

Held, allowing the appeal: (1) the learned magistrate had taken the outstanding offences into consideration in favour of the appellants and had also taken into consideration factors which were in favour of the appellants;

(2) the restitution of money by Bank Bumiputra Malaysia Bhd. could not be a mitigating factor. It was a separate exercise agreed to between the bank and the Tunku;

(3) it was within the discretion of the learned magistrate to pass a consecutive sentence. However, bearing in mind all the mitigating factors (the plea of guilty, first offenders, the outstanding offences agreed to be taken into consideration and, most important of all, that the maximum term of imprisonment for each offence was two years), a sentence of 14 months' imprisonment was manifestly excessive and unreasonable. An appropriate or fair punishment for each offence would be one year's imprisonment;

(4) the decision of the learned magistrate in ordering the sentence to run consecutively was not wrong in principle having regard to the offences and the totality of the sentences.

Cases referred to:

(1) *Zafaruddin bin Abdul Rahman* v. *Public Prosecutor* Penang Criminal Appeals No. 11 of 1986 and 17 of 1986 (unreported) (refd).
(2) *R.* v. *Cutbush* (1867) L.R. 2 Q.B. 329 (refd).
(3) *Marimuthu Balikrishnan* v. *Public Prosecutor* [1974] 2 M.L.J. 145 (refd).

CRIMINAL APPEAL.

Yeap Chye Choon for the appellants.

Mohamed Bazain bin Idris (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This appeal raises some points of practical importance. Both appellants, who are father and son, were charged in the Penang Magistrate Court, Georgetown on June 25, 1987 for the following offences:

"(i) on March 6, 1984 dishonestly used as genuine certain document, to wit Bank Bumiputra Malaysia Bhd. cheque number 510267 for the sum of $11,800.00 belonging to Y.T.M. Tunku Abdul Rahman Putra Al-Haj which you knew to be forged, and that you have thereby committed an offence under section 471 of the Penal Code and punishable under section 465 of the same Code read with section 34 of the said Code;

(ii) on March 6, 1984, dishonestly misappropriated Bank Bumiputra Malaysia Bhd. cheque number 510267 for the sum of $11,800.00 and that you have thereby committed an offence punishable under section 403 of the Penal Code read with section 34 of the said Code;

(iii) on May 18, 1984, dishonestly used as genuine certain document, to wit Bank Bumiputra Malaysia Bhd. cheque number 573602 for the sum of $9,000.00 belonging to Y.T.M. Tunku Abdul Rahman Putra Al-Haj which you knew to be forged, and that you have thereby committed an offence under section 471 of the Penal Code and punishable under section 465 of the same Code read with section 34 of the said Code;

(iv) on May 18, 1984 dishonestly misappropriated Bank Bumiputra Malaysia Bhd. cheque number 573602 for the sum of $9,000.00 belonging to Y.T.M. Tunku Abdul Rahman Putra Al-Haj and that you have thereby committed an offence punishable under section 403 of the Penal Code read with section 34 of the said Code;

(v) on June 21, 1984 dishonestly used as genuine certain document, to wit Bank Bumiputra Malaysia Bhd. cheque number 573616 for the sum of $12,000.00 belonging to Y.T.M. Tunku Abdul Rahman Putra Al-Haj which you knew to be forged, and that you have thereby committed an offence under section 471 of the Penal Code and punishable under section 465 of the same Code read with section 34 of the said Code;

(vi) on June 2, 1984 dishonestly misappropriated Bank Bumiputra Malaysia Bhd. cheque number 573616 for the sum of $12,000.00 belonging to Y.T.M. Tunku Abdul Rahman Putra Al-Haj and that you thereby committed an offence punishable under section 403 of the Penal Code read with section 34 of the said Code."

Both appellants pleaded guilty to the above six charges and were convicted by the learned magistrate. Before sentence was passed, the learned Deputy Public Prosecutor tendered about 112 outstanding offences amounting to a total of 56 charges under section 171A(i) of the Criminal Procedure Code. After hearing submissions on mitigation, the learned magistrate sentenced both appellants to a term of 14 months' imprisonment for each of the above six charges, to run consecutively from the date of their remand. Both appellants have now appealed against sentence.

Mr. Yeap Chye Choon, for the appellants, submitted that the sentence imposed by the learned magistrate was manifestly excessive and wrong in law for the following reasons:

(1) he placed too much emphasis on the outstanding offences to be taken into consideration which should have been considered in favour of the accused;

(2) he failed to consider that a substantial amount of money had already been paid back to the Tunku. (This is confirmed by Mr. Deputy who informed this court that Bank Bumiputra Malaysia Bhd., Penang Branch, had compensated the Tunku for the loss.);

(3) that the sentence passed should have been a concurrent sentence.

Section 171A(i) of the Criminal Procedure Code states:

"Where in any criminal proceedings instituted by or on behalf of the Public Prosecutor the accused is found guilty of an offence, the court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed:

Provided that ..."

It is abundantly clear to me from the above section that the court, in determining and in passing sentence on the accused who is found guilty of an offence, may take into consideration any other outstanding offences which the accused admits to have committed. Certainly, this is a factor to be taken in favour of the accused because by admitting to have committed other outstanding offences considerable time and money is thereby saved in prosecuting them. In the present appeal, the issue is whether or not the learned magistrate has taken these outstanding offences into consideration in favour of both appellants. Upon reading his grounds of judgment, I am satisfied that he has done so and in doing so, he has taken into consideration factors which are also in favour of the appellants, *i.e.* that they are first offenders and that they had pleaded guilty to the six charges. The punishment for offences under sections 465 and 403 of the Penal Code are an imprisonment which may ex-

tend to two years, or with fine or with both respectively. Taking these factors into consideration, the learned magistrate then sentenced the appellants to 14 months' imprisonment on each charge.

On the question of a substantial sum of money in the form of restitution which had been made by Bank Bumiputra Malaysia Bhd. to the Tunku, in my judgment this repayment cannot be a mitigating factor in favour of the appellants. This is a separate exercise agreed to between the Bank and the Tunku.

Thirdly, and which is the most important ground: did the learned magistrate err in law or in principle when he sentenced both appellants to 14 months' imprisonment on each of the six offences to run consecutively? Upon reading his grounds of judgment, I form the view that he had taken the following factors in mind. The first appellant was a former clerk of the Tunku and was naturally placed in a position of trust. He felt that the dishonest use and misappropriation of the three cheques (the subject matter of the charges) belonging to the Tunku were serious offences. The appellants had further admitted to similar use of about 53 cheques involving a total sum of $344,450.00 for a period of time between 1983 and 1984. Each of the 56 cheques gave rise to two separate offences under the Penal Code. Hence, by pure calculation, both appellants had committed a total of 112 offences punishable under sections 465 and 403 of the Penal Code with a maximum sentence of imprisonment for two years, or with fines or with both. According to him, the sentence to be imposed had to drive home to both appellants a lesson that "the law does not countenance the criminal conduct as is displayed by them in this case". In his judgment, the learned magistrate stated thus:

"In the present case there are a total of about 106 offences to be considered for sentencing purposes. Bearing in mind the factors alluded to above and giving them the due consideration I imposed a sentence of 14 months' imprisonment on each charge, the sentences to run consecutively (to reflect the gravity of the offences)."

On this issue, Mr. Yeap referred me to the case of *Zafaruddin bin Abdul Rahman* v. *Public Prosecutor*[1] where this court, on appeal, varied the sentence of fine by the learned magistrate to one year's imprisonment on each of the three charges under section 465 of the Penal Code to run concurrently. In fact, from the grounds of judgment, the learned magistrate in the present case also considered *Zafaruddin*[1] but seemed to distinguish the case and imposed a sentence of 14 months' imprisonment to run consecutively as reflecting the gravity as well as the total number of the offences considered for the purpose of sentencing.

Where an accused is charged with several offences at one trial and convicted, he may be sentenced to several terms of imprisonment, one after the conclusion of the other. This is clearly provided by section 102 of the Subordinate Courts Act 1948. Therefore, upon an indictment containing two counts for distinct offences, the accused, if found guilty of each count, may be sentenced to imprisonment for two consecutive terms of punishment (*R.* v. *Cutbush*[2]). In the present appeal, both offences, the subject matter of the six charges, are clearly two distinct offences, one for dishonestly using as a genuine a forged document under section 471 and the other for dishonest misappropriation of property under section 403 of the Penal Code. Moreover, these offences were not committed in the course of the same transaction, although in point of time two offences were committed on the same day. Therefore, in my judgment, it is within the discretion of the learned magistrate to pass a consecutive sentence. However, bearing in mind the mitigating factors, *i.e.* the plea of guilty, first offenders and outstanding offences agreed to be taken into consideration, and most important of all that the maximum term of imprisonment for each offence is two years, in my considered judgment, a sentence of 14 months' imprisonment is manifestly excessive and unreasonable. I think an appropriate or fair punishment for each offence will be one year's imprisonment. In the result, I allow this appeal against sentence by reducing the period to that of one year's imprisonment. On the other hand, on the basis of the principles discussed above, in my judgment, the decision of the learned magistrate to order the sentence to run consecutively is not wrong in principle having regard to the offences and the totality of the sentences (see *Marimuthu Balikrishnan* v. *Public Prosecutor*[3]).

Appeal allowed.

Solicitors: *Yeap Chye Choon & Co.*